Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL C. MORAN
STEIN, MORAN, RAIMI & GOETHEL, P.C.
320 N. Main Street, Suite 101
Ann Arbor, MI 48104
(734) 769-6838
Counsel of Record

FREDERICK L. SCHMOLL
MICHAEL W. EDMUNDS
GAULT DAVISON, P.C.
Northbank Center
Flint, MI 48502-2032
(810) 234-3633
Co-Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause imposes upon city police officers who arrest a man for destruction of property belonging to a homeless shelter and then transport him to another location, a duty to protect that person from injury by third persons after the officers have released the man from custody, where the reason for releasing the man from custody at another location was that the county jail would not accept him because it was overcrowded, and the arrested person stated that if released at the jail he would return to the homeless shelter and destroy more of its property?

2. Whether the Court Below erred when it evaluated the question whether a claim had been stated under 42 U.S.C. 1983 for violation of the Fourteenth Amendment's substantive Due Process guarantees using a "deliberate indifference" standard, rather than the "shocks the conscious" standard which this Court established in *County of Sacramento v. Lewis*, (May 28, 1998), where the claim is made against police officers who arrested an intoxicated man for property destruction and then released him on the side of a road because the jail was overcrowded and could not accept the man, and, where after the man's release, he was struck and injured by a car driven by a third person?

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

QUESTIONS PRESENTED – Continued

3. Whether the courts below erred in denying police officers claims for qualified immunity in a case under 42 U.S.C. 1983 alleging a substantive Due Process violation, when the courts below held that in November 1994 police officers had a clearly established Constitutional obligation not to do anything to increase the danger of an intoxicated person to injury from third persons when they move him to another location to prevent the commission of a crime and release him from custody there?

LIST OF PARTIES

The parties of the proceedings below were the petitioner Steverson Davis and the respondents Flint, Michigan police officers Patrick Brady and Shawn Murphy.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Flint, Michigan police officers Patrick Brady and Shawn Murphy respectfully request that this Court issue a Writ of Certiorari to review the Judgment and Opinion of the Sixth Circuit entered on May 8, 1998.

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998), Appendix, at 1a-13a. The Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc on June 29, 1998. Appendix, at 23a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 8, 1997. Appendix, at 1a-13a. On June 29, 1998, the Court of Appeals denied a timely Petition for Rehearing. Appendix, at 23a. Pursuant to Supreme Court Rule 13.1 and 13.3, this Petition has been filed within ninety days of the denial of rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment 14 Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

November 17, 1994. Flint, Michigan. Thanksgiving. Respondent Steverson Davis was drinking. He had stolen a bottle of Thunderbird wine from a Rite Aid drugstore, drank it, and when it was gone, went back to the Rite Aid and stole another bottle of Thunderbird. When that was gone, he headed back toward the Rite Aid, but before he got there he met another man who had vodka and they sat around and drank a pint before both walked to the Carriage House Mission, a homeless shelter, for a meal. Deposition of Steverson Davis (hereafter SD), at 31-36. Davis, who had been staying at the mission for three weeks acknowledged that when he drinks he gets "a little bit nasty." SD, at 20, 40.

At 6:38 PM, Petitioners Flint, Michigan police officers Shawn Murphy and Patrick Brady received a radio run notifying them of "trouble with a man" at the mission. Arriving at the mission, Officers Murphy and Brady found Steverson Davis outside the mission shouting abusively at John Prout. Deposition of Shawn Davis (hereafter SM), at 31. Mr. Prout, the manager of the mission, told Officer Brady that Davis had been staying at the mission, but when Davis arrived around dinner time that evening, he had refused to admit Davis because he had been drinking. Mr. Prout had offered to provide Mr. Davis a meal in a separate room at the mission, but Davis became enraged, punched out several windows inside the mission, and then went outside and began breaking the mission's large windows by throwing rocks through them. Mr. Prout told Officer Brady that he wanted to

press charges against Davis and that he never wanted Steverson Davis on the mission property again. Deposition of Patrick Brady (hereafter PB), at 32.

Davis admitted that he had broken the mission's windows and said that he would do it again. SM, at 32. Davis was very abusive toward Mr. Prout, told Officer Murphy that Prout had no right to kick him out of the mission and vowed "to beat that motherfucker's ass." SM, at 31. While angrily shouting at Mr. Prout that he knew karate, Davis made several karate kicks and punches in the air directed toward Mr. Prout. When Davis' anger "just kept escalating," and he began "hand thrust pointing" and yelling abusively at Mr. Prout, Officer Murphy stepped between them and placed Mr. Davis under arrest. SM, at 33-37.

Davis did not resist the arrest, but continued to yell very loudly at Mr. Prout. SM, at 44-45; PB, at 32. According to Mr. Prout, the officers were "really good . . . [and] super polite." Deposition of John Prout, at 10.

At the police station, Davis refused to be photographed or fingerprinted. He again demonstrated his karate skills by kicking and punching the air around him. SM, at 61; PB, at 54. The officers processed a misdemeanor charge against Davis and discovered that he had other outstanding misdemeanor warrants against him. When they told Davis that if he refused to be printed they had been instructed to take him to the Genesee County Jail, Davis remarked that was all right, "I'll eat my Thanksgiving on you." PB, at 53.

On route to the jail, Davis began carrying on again about Mr. Prout saying that he was going to go down to

the mission and kick out the rest of the windows. SM, at 68-69. When they arrived at the County Jail, the deputies refused to accept Mr. Davis as an inmate because Davis was only charged with misdemeanors, and the jail was at capacity. Under Michigan statute, if the county deputies accepted Davis as a prisoner, they would be required to release a prisoner into the community. COUNTY JAIL OVERCROWDING EMERGENCY POWERS ACT, MCL 801.51 *et seq.*; MSA 28.1758(1) *et seq.*

When Officer Murphy went to retrieve Mr. Davis from the county jail holding cell, he asked Davis where he wanted to go. Davis replied, "Take me back to the mission and I'll break out the rest of the windows." SM, at 80, 86. Uncertain about what to do, Officer Murphy called the police station to advise of the jail's refusal to accept Davis and to ask what to do with him. Sergeant Mabry asked Murphy if Davis was so drunk that he was a danger to himself, and Officer Murphy advised that he was not. SM, at 88. The Sergeant said, "Go ahead and release him PFI [pending further investigation]." Sergeant Mabry meant to convey, and Officer Murphy understood, that Officer Murphy had some discretion in the matter of what to do with Mr. Davis. Deposition of Jeffrey Mabry, at 13; SM, at 89-90. The officers drove Davis away from the area of the mission and let him off at the lighted entrance to Bluebell Beach, a public park. Although the officers believed that the speed limit on the adjacent road was lower, it is undisputed that there was no posted speed on this two lane road, and, therefore, under Michigan law the speed limit was 55 MPH.

The above facts are undisputed, but from here the parties' versions diverge. Officers Brady and Murphy

testified that because Davis was threatening to return to the mission and break more windows, they told Davis to tell them someplace where they could take him; that Davis replied that he wanted to be taken to the North end, where he had an uncle; and that they drove him to the North end and released him at the lighted park entrance. Davis said that the officers did not ask him where he wanted to go. He insisted that they drove to the North end and let him off on an unfamiliar street, in order to "teach him a lesson."

It is also undisputed that Mr. Davis walked to several houses near the park and talked to a Mrs. Piccabotta and her daughter, and that after leaving her house he encountered Genesee Township Police Officer Carlson. Officer Carlson talked to Davis for a few minutes and then drove away. The Piccabottas and Officer Carlson disagreed with Davis regarding the substance of their contacts with Davis. Mrs. Piccabotta said that Davis was angry with the Flint police officers, and claimed that he was going to sue them. She testified that she offered to help Mr. Davis by calling someone to assist him, but that he refused any help saying only that he wanted witnesses for his law suit against the officers. Deposition of Sheron Piccabotta, at 17-18. Mr. Piccabotta called 911. Minutes later, responding to that call, Township Officer Carlson encountered Davis, who flagged him down in the middle of the road. Davis told Officer Carlson that he wanted to sue the Flint officers. Officer Carlson said that he, too, offered to call a taxi or an ambulance, or otherwise to assist Davis, but he refused saying that all he wanted was witnesses. Deposition of Bruce Carlson, at 19. Officer Carlson said that he could not determine whether he was intoxicated. Davis

claims that he asked all of these people for help but that they refused to help him in any way. Within minutes of Officer Carlson's departure, Davis was struck by a car and seriously injured.

B. PROCEEDINGS BELOW:

Davis brought an action in the United States District Court for the Eastern District of Michigan, which included several state common law claims and federal claims under 42 U.S.C. §§ 1983 and 1985. In his § 1983 claim, Davis asserted that his rights under the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States were violated. The complaint contained a separate count entitled "Special Relationships," in which Davis asserted that "[o]nce defendants had custody and control of Steverson Davis, they owed him the duty of reasonable care and protection because of the special relationship between the officers and Steverson Davis as their detainee." First Amended Complaint, at ¶ 30, Appendix, at 30a. Davis claimed that the officers breached the duty "of reasonable care and protection" owed to him by "[p]lacing [him] in a position of danger that he would not otherwise have been in but for the actions of the defendants." *Id.*, at ¶ 31C, Appendix, at 30a. Finally, the complaint alieged that "[d]efendants acted with deliberate indifference to the rights, care and protection of Steverson Davis while he was in the custody, care and control of defendants." *Id.*, at ¶ 32, Appendix, at 30a-31a.

The Officers answered denying that they had a special relationship with Davis after they released him from

custody and asserted an affirmative defense of qualified immunity.

Petitioners filed a motion for summary judgment asserting that the § 1983 count failed to state a claim. The motion was argued before the District Court on January 8, 1996. Officers Brady and Murphy asserted that:

1. They had no special relationship with Mr. Davis at the time of his injury, because their relationship with him terminated upon his release from custody, and there was no obligation to protect Davis thereafter. Transcript 1/8/96, hereafter T1, at 8.

2. They did nothing affirmatively to prevent Davis from caring for himself and did not place Davis in a position where injury was certain to occur. T1, at 5.

3. They were entitled to qualified immunity because there was no clearly established right "not to be taken somewhere, even taken against your will and dropped off if that's not the cause of the injury." T1, at 8-9.

4. They were entitled to immunity unless their acts "shocked the conscience," citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 103, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989), or were at least "egregious," citing *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995). T1, at 10.

Davis argued that when the officers arrested him a "special relationship" was "triggered," and they owed him a "duty of reasonable care and protection." T1, at 13. Furthermore, he argued, that duty of care "cannot be avoided by deciding to release someone who was still high – highly intoxicated and who was unable, realistically, to care for his needs." T1, at 13. Asserting that

Davis' release by the officers at Bluebell Beach Park violated the Sergeant's order to release him at the jail and a departmental policy against transporting a detainee without seeking permission, Davis argued that the officers placed him in a position of danger by releasing him in a dark area while he was still so intoxicated that he was a "danger to himself." T1, at 17-19. Petitioners replied that if police department policy were violated, that was irrelevant to the question whether a constitutional violation was alleged.

The District Court denied the motion for summary judgment holding that there was "no exigency" which justified the officers releasing Davis on a dark country road, miles from the sight of his arrest and in a drunken condition. Appendix, at 21a. "If the facts are borne out at trial and those facts certainly constitute **deliberate indifference** and any reasonable officers under the circumstances should have been well aware that he (sic) was prohibited under his own doing from placing citizens **dependent upon the paternal status of the state in such danger.**" Appendix, at 21a (emphasis added).

After the conclusion of discovery, Petitioners brought another motion for summary judgment on both the § 1983 and § 1985 claims. On November 18, 1996, the Court heard argument on the motion, granted the dismissal of the § 1985 claim as unsubstantiated, and again denied the motion as to the § 1983 claim. The Court held that "the standards of *DuChaney* (sic) were met. The special relationship was established which required that the officers **provide for his safety thereafter.**" Appendix, at 17a (emphasis added). The officers violated that duty, the

Court found, by releasing Davis in a dangerous situation and by being "deliberately indifferent to [Davis'] needs . . . . " Appendix, at 18a.

Petitioners Brady and Murphy appealed the denial of their motion for summary judgment to the United States Court of Appeals for the Sixth Circuit. On May 8, 1998, eighteen days before this Court's opinion in *County of Sacramento v. Lewis*, 523 U.S. ___, 140 L.Ed.2d 1043, 118 S.Ct. ___, 1998 U.S. LEXIS 3404 (May 26, 1998) the Sixth Circuit affirmed the denial of Petitioners' motion for summary judgment. 143 F.3d 1021 (6th Cir. 1998). The Court of Appeals held that in order for the Court to find a violation of a constitutionally protected right:

> First, . . . the court must conclude that the plaintiff and the state actors had **a sufficiently direct relationship** such that the defendants owed [him] a duty not to subject [him] to danger. Second, the court must also conclude that the officers where sufficiently culpable to be liable under a substantive due process theory.
>
> Appendix, at 5-6 (emphasis added).

Citing *DeShaney*, the Court held that since Davis had been in custody the officers owed him a duty:

> after taking Davis into custody, the defendant officers dropped Davis off on a dark, busy highway and left him there against his will. In so doing, the defendant officers took the affirmative act of restraining Davis's freedom to act on his own behalf and consequently imposed upon **themselves a duty to ensure that they were not placing him in danger.**
>
> Appendix, at 7a (emphasis added).

In response to Petitioners' argument that *DeShaney* only applied to situations where the state restrained a person, thereby taking away his ability to care for himself, the Court stated that *DeShaney* suggests "that the state may owe a duty to individuals in certain non-custodial settings," and, quoting another Sixth Circuit case, held that this language "stands for the proposition that 'a duty to protect can arise in a noncustodial setting if the state does **anything** to render an individual more vulnerable to danger.' " Appendix, at 9a (emphasis added). Rejecting Petitioners' argument that any duty of reasonable protection ended when they released Davis from custody, the Sixth Circuit held that, "[w]hat is key is that the defendant officers put Davis in a situation, while in custody, and allegedly against his will, that caused his injuries." Appendix, at 10a. Finally, having found that Petitioners owed a "duty of care," the Sixth Circuit held that the question whether they had breached that duty was to be evaluated under the **deliberate indifference** standard, and so evaluated, that Davis' complaint "supports a claim that defendant officers acted with **deliberate indifference** to the threat of injury to him. They knew, or reasonably should have known, that Davis was drunk and unable to care for himself." Appendix, at 12a (emphasis added).

In the Sixth Circuit a motion for reconsideration must be filed within fourteen days of the decision. Internal Operating Procedure 20.1. The *Lewis* opinion had not yet been released. Petitioners filed a timely Motion for Rehearing and Suggestion for a Rehearing En Banc on May 22, 1998. The motion asserted that the hearing panel had violated *DeShaney* because *DeShaney*'s duty was

predicated upon state restraint, not simply the fact that the plaintiff had once been in custody. It argued that "under the panel's decision, officers face liability for subsequent injuries whether they release an intoxicated person at home, on the street, or at a detox center." Appendix, at 42a. In addition, the motion asserted that the Sixth Circuit had not previously adopted a "state created danger" theory as the law of the circuit and should, therefore, reconsider the question of qualified immunity. Appendix, at 40a-41a. On June 29, 1998, the Sixth Circuit denied the motions.

As stated above, this Court's opinion in *County of Sacramento v. Lewis, supra,* was released eighteen days after the panel's opinion affirming the denial of Petitioners' motion for summary judgment, and four days after the filing of the motion for reconsideration. The Sixth Circuit rules do not provide for the filing of additional briefs or motions.

REASONS FOR GRANTING THE WRIT

INTRODUCTION:

The Sixth Circuit's analysis of the question whether Respondent's complaint stated a claim under 42 U.S.C. § 1983 for violation of his rights under Fourteenth Amendment substantive Due Process never addressed what this Court described as "the threshold question . . . whether the behavior of the governmental officer [was] so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis,* 140 L.Ed.2d, at 1058 n.8. Indeed, the

Court's analysis failed even to recognize that the core concept of the Due Process clause is the "protection against arbitrary action." *Id.*, at 1056-1057. Moreover, failing to heed this Court's direction "to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to . . . a font of tort law," the Sixth Circuit clearly approached this case as a tort case. In reaching its result, the Sixth Circuit misapplied this Court's opinion in *DeShaney*, violated this Court's subsequent opinion in *Lewis*, and placed itself in direct conflict with the Seventh Circuit's opinion in *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (3rd Cir. 1997). For each of these reasons this Court should grant this petition for a writ of certiorari.

I.

THE COURT BELOW ERRED WHEN IT EVALUATED THE QUESTION WHETHER A CLAIM HAD BEEN STATED UNDER 42 U.S.C. § 1983 FOR VIOLATION OF THE FOURTEENTH AMENDMENT'S SUBSTANTIVE DUE PROCESS GUARANTEES UNDER A "DELIBERATE INDIFFERENCE" STANDARD RATHER THAN THE "SHOCKS THE CONSCIENCE" STANDARD THAT THIS COURT ADOPTED IN *COUNTY OF SACRAMENTO v. LEWIS*.

In *County of Sacramento v. Lewis, supra*, this Court answered the question whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing injury through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. Pointing to its prior opinions that the "core of the concept" was

"protection against arbitrary action," 140 L.Ed.2d, at 1056-1057, and that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,' " *id.*, at 1057, this Court rejected the Ninth Circuit's use of the deliberate or reckless indifference standard and held that "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.*, at 1058 n.8. Stating that "the measure of what is conscience-shocking is no calibrated yard stick," (*id.*, at 1058) and that the "concept of conscience-shocking duplicates no traditional category of common-law fault," (*id.*), this Court held that where there is no "intent to injure in some way unjustifiable by any governmental interest," (*id.*, at 1059) "our concern with preserving the constitutional proportions of substantive due process demands an *exact analysis of circumstances* before any abuse of power is condemned as conscience-shocking." *Id.*, at 1060 (emphasis added). In *Lewis*, this Court held that such an analysis must take into account recognition and balancing of competing law enforcement "obligations that tend to tug against each other." *Id.*, at 1061. After a careful analysis of those law enforcement interests in light of the facts presented, this Court held that, without an intent to cause harm, the Fourteenth Amendment did not give rise to liability. *Id.*, at 1062.

In the case at bar, no such analysis was engaged in by either the District Court or the Sixth Circuit Court of Appeals. Indeed, the opinion of the Sixth Circuit never once even mentions the phrase "shocks the conscience" in its analysis or in its explication of the interests protected

by the Fourteenth Amendment. The opinion below does not even purport to analyze "the large concerns of the governors and the governed" which engaged this Court in *Lewis* when analyzing the conduct at issue. Rather, the Sixth Circuit analyzed the issue as presenting two different questions: Whether Mr. Davis and the police officers had a "**sufficiently direct relationship**" such that the officers owed Davis a duty not to subject him to danger, (Appendix, at 6a) and, if so, whether the officers "acted **with deliberate indifference** to the threat of injury to him." Appendix, at 12a (emphasis added). In answering the second question the Sixth Circuit violated this Court's opinion in *Lewis*; and in answering the first question it misapplied this Court's holding in *DeShaney*. *See*, REASON FOR GRANTING WRIT, AT II.

The standard announced in *Lewis* calls for the presentation and analysis of facts additional to those that were considered in evaluating whether the officers were deliberately indifferent to Mr. Davis' rights. Perhaps because the use of the deliberate indifference standard in the context of municipal liability is focused upon searching for rules of governmental practice, the courts below placed emphasis upon the officers' alleged violation of police department procedures. As *Lewis* has now made clear, however, such a focus is misplaced and completely irrelevant. Indeed, the officer in *Lewis* had violated departmental regulations which directly governed conduct in high speed chases, a factor which this Court gave no weight in the constitutional analysis. Rather, *Lewis* directs that when a police officer is alleged to have violated the substantive guarantees of the Fourteenth Amendment's Due Process clause in the exercise of his

law enforcement duties, the District Court should consider: what the officer's law enforcement object was; whether there were competing law enforcement objectives that tug in different directions making the exercise of discretion problematic; the need of police officers to act decisively under pressure as the situation evolves; the absence the luxury of the second chance that repeated reflection permits; the time frame and factual context within which the law enforcement decision is made; and, finally, whether, in light of these considerations, the acts of the state officers shock the contemporary conscience. None of that analysis was undertaken here, and, as a result, this Court should remand this matter to the Sixth Circuit, perhaps with direction to remand to the District Court, for consideration in light of this Court's subsequent opinion in *Lewis*.

The facts of the instant case clearly call for analysis under *Lewis*. Here, as in *Lewis*, the officers did not have an intent to injure. Here, the officers, like officers in *Lewis*, were faced with conflicting law enforcement objectives. On the one hand these city police officers had arrested a person for committing a criminal offense, who they had to release because the county jail refused to accept him. On the other, the arrested person was familiar with karate, had told the officers that he was "going to beat [the manager of the homeless shelter's] ass," and had further vowed that if released by the officers he would return to the shelter and break out the rest of the windows. The officers' attempt to protect both the person of Mr. Prout and the property of the homeless mission, was clearly a legitimate, countervailing law enforcement objective. Like the situation in *Lewis*, these interests pull

in conflicting directions. These officers, like the officers in *Lewis*, had to act decisively, under pressure, and as the situation developed. The circumstances called for quick action without the luxury that true reflection permits. The District Court and the Sixth Circuit called Officer Murphy and Officer Brady to task for the decision that they made amongst these competing objectives, but they never evaluated that choice in the constitutional terms required by *Lewis*.

The Sixth Circuit has had a long history of confusing the state of mind that supports a constitutional violation with the state of mind that supports only a claim in tort. Indeed, in *Lewis* this Court specifically recognized that in the context of a high speed police chase, the Sixth Circuit stood alone among the circuits in setting far too low a test of culpability. In footnote 3 of that opinion, 140 L.Ed.2d, at 1053, this Court could only surmise that the Sixth Circuit would raise its test from "gross negligence" to "deliberate indifference," the test that this Court then rejected as constitutionally too low. It is no wonder, then, that without the benefit of the *Lewis* opinion, the Sixth Circuit did not see fit to increase its constitutional sights by two notches – from "gross negligence" to "shocks-the-conscience." Clearly, this case should be reevaluated in light of *Lewis*. The case at bar is now binding law in the Sixth Circuit and governs all subsequent cases in the Circuit. It was decided without the benefit of *Lewis*, applies the wrong standard, and will work significant mischief unless vacated and remanded by this Court.

In cases decided since the *Lewis* decision, other circuits evaluating substantive Due Process claims against police officers have recognized the importance of the

Lewis opinion, and benefited from its directions. In *Rogers v. City of Little Rock*, 1998 U.S. App. LEXIS 18340 (8th Cir. 1998) a police officer was charged with violating substantive Due Process guarantees when he stopped a woman for a traffic offense, then released her and followed her to her home, where she said he forced her to have intercourse. The Eighth Circuit first described the opinion in *Lewis*:

> In a lengthy discussion of the fifty year history of the shocks the conscience test and the policy behind it, the Court explained why this is the appropriate test to apply to substantive due process claims and how the test serves to distinguish abusive executive acts amounting to constitutional violations from breaches of common law duties covered by tort law. *Id.* at 1717-18. Conduct that is 'intended to injure in some way unjustifiable by any government interest' is likely to be conscience shocking. . . . The threshold question in a due process challenge to abusive conduct by a state actor is 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' "
>
> *Id.*, at 6.

Using the appropriate test, the Court held that the conduct at issue did shock the contemporary conscience because it was intentional conduct at the extreme end of the scale and was unjustified by any governmental interest.

In *Armstrong v. Squadrito*, U.S. LEXIS 17018 (7th Cir. 7/24/98) plaintiff agreed to turn himself in on a bench

warrant regarding a child support problem, with the understanding that he would be held for a couple of hours and then taken to court and released. He appeared at the jail as agreed, but he was kept there for 57 days without ever being taken to court, despite his repeated requests to find out why he was not on the arraignment list. In a thoughtful analysis of the historic concerns expressed by this Court in *Lewis*, the Seventh Circuit evaluated the right to be heard promptly on a bench warrant; and, focusing upon the jail officers' opportunity to frequently reflect upon the basis for Mr. Armstrong's incarceration because of his repeated requests for information, and upon the absence of a competing law enforcement objective, found the jail employees' actions shocking.

This case, too, would benefit substantially from reconsideration in light of *Lewis*, and, since the case is before this Court pre-trial, there is no reason for this Court not to grant certiorari and summarily remand for reconsideration.

When this Court rendered its opinion *DeShaney v. Winnebago, supra,* it remanded cases which were evaluated under guidelines established prior to that opinion, for consideration in light of the new opinion. *See, e.g., Smith v. Stoneking*, 489 U.S. 1062, 103 L.Ed.2d 804, 109 S.Ct. 1333 (1989); *City of New Kensington v. Horton*, 489 U.S. 1062, 103 L.Ed.2d 805; 109 S.Ct. 1334 (1989). The same course should be followed here.

II.

THE COURT BELOW ERRED WHEN IT FOUND *DeSHANEY v. WINNEBAGO COUNTY DEP'T OF SOC. SERVS.* STANDS FOR THE PROPOSITION THAT THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE IMPOSES LIABILITY UPON A POLICE OFFICER WHO DOES *ANYTHING* TO ENHANCE AN INTOXICATED PERSON'S VULNERABILITY TO INJURY AFTER THAT PERSON IS RELEASED FROM CUSTODY.

In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989), a child who was suspected of suffering from physical abuse at the hands of his father, was removed from his father at the petition of the Department of Social Services and placed in the temporary custody of a hospital. Subsequently, the Department of Social Services returned the child to the custody of his father, who beat him so severely that he suffered brain damage and was confined to an institution for the profoundly retarded. In an action brought under 42 U.S.C. § 1983, the District Court granted summary judgment to the DSS employees, rejecting the child's argument that the Fourteenth Amendment's substantive Due Process guarantees imposed upon the DSS employees the duty to protect him from violence at the hands of his father. The Seventh Circuit Court of Appeals affirmed that holding, placing itself in conflict with a holding of the Third Circuit, which had found a duty to provide adequate protection in similar circumstances. This Court granted certiorari in order to resolve that conflict. Noting that "nothing in the language of the Due Process Clause itself required the State to protect the life, liberty, and property of its citizens against

invasion by private actors," 489 U.S., at 195, this Court "concluded that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.*, at 197.

Next, this Court turned to the child's assertion that while there was no duty to provide the general public with adequate services, a duty arose to protect this child because the state knew that the child faced danger and had taken him into its custody. Petitioner argued that the DSS' failure to protect the child under these circumstances was an abuse of governmental power so shocking to the conscience as to constitute a substantive Due Process violation. This Court unequivocally rejected those arguments, holding that only in limited circumstances where the "State takes a person into its custody **and holds him there against his will**, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.*, at 199 (emphasis added). To clarify its holding, this Court pointed to its previous opinions imposing upon the state a duty of care for persons "wholly dependent on the State" because they are incarcerated in prison following a criminal sentence, held in jail pending a criminal trial, or involuntarily committed to a mental institution. *Id.*, at 200. Furthermore, this Court noted that even in those limited circumstances, "we have recognized that the State 'has considerable discretion in determining the nature and scope of its responsibilities.' " *Id.*, at 200 n.7, quoting *Youngberg v. Romeo*, 457 U.S. 307, 317, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982). Providing even further clarification of its holding, this Court stated that the constitutional duty

was not imposed because of the state's knowledge of Respondent's vulnerability:

> The affirmative duty to protect **arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.** . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.
>
> 489 U.S., at 200 (emphasis added).

Next, this Court rejected the argument that the duty was triggered because the state had earlier taken custody of the child:

> The Estelle-Youngberg analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered did not occur while he was in the State's custody, but while he was in the custody of his natural father who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; **the State does**

> **not become the permanent guarantor of an individual's safety by having once offered him shelter.**
>
> *Id.*, at 201 (emphasis added).

The Sixth Circuit analyzed the question whether there was a duty imposed by the Fourteenth Amendment's substantive guarantees by looking to see if there were a "sufficiently direct relationship" between the police officers and Mr. Davis so as to impose a duty. The Court held that such a relationship existed when the officers placed Davis under custodial arrest. Then, the Sixth Circuit concluded that once a person is placed in a custodial arrest by a state officer, that officer has a duty to protect him from injury caused by a third party even after his release from custody, if, while a custodial relationship existed, the officer did "**anything** to render [him] more vulnerable to danger." Appendix, at 9a, quoting *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994) (emphasis added). In other words, the Court stated, "[w]hat is key is that the defendant officers put Davis in a situation, while in custody, and allegedly against his will, that caused his injuries." Appendix, at 10a. Summarizing, the Sixth Circuit concluded:

> When a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, he must demonstrate, first that the defendants owed him a duty not to subject him to danger and, second, that the defendants violated this duty by exhibiting deliberate indifference to the plaintiff's well being.
>
> Appendix, at 12a.

The Sixth Circuit opinion is clearly at odds with this Court's opinion in *DeShaney*. It completely ignores this Court's explanation that the duty of care which is placed upon the state when it incarcerates or commits one of its citizens is not a result of the state's knowledge "of his predicament" (*e.g.*, that he has been drinking), "but from the limitation which it has imposed on his freedom to act on his own behalf." Here, however, when the officers released Mr. Davis from custody at a location away from the scene of the crimes that he had committed because he threatened to renew his destruction of mission property if released near the homeless shelter, the only "limitation . . . imposed on his freedom to act" was the limitation of his ability to commit more crimes. Surely, that limitation, grounded as it was in a legitimate law enforcement objective, is not constitutionally similar to the situations described in *DeShaney* – where the state "takes a person into custody and holds him there." The kind of "but for" analysis employed by the Sixth Circuit simply cannot be used to answer the constitutional questions at issue. Indeed, under the Sixth Circuit's analysis, this Court would have upheld the claim made on behalf of young Joshua DeShaney, because while that child was in the custody of the state, state DSS officers "put him in a situation . . . that caused his injury" by returning him to his father despite knowing of the possible peril in which they placed him. But for that child's return to his father he would not have been injured. But for the fact that the police chased Lewis on his motorcycle at high speeds, he would not have been injured. Again, it is clear that the Sixth Circuit was focused upon tort concepts rather than on concepts of constitutional dimension.

The Sixth Circuit sought to distinguish the holding in *DeShaney*:

> *DeShaney*, however, is not dispositive here. Language in that opinion suggests that the state may owe a duty to individuals in certain non-custodial settings:
>
> > While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.
>
> 489 U.S. at 201. Significantly, we have previously suggested this language in *DeShaney* stands for the proposition that "a duty to protect can arise in a noncustodial setting if the state does **anything** to render an individual more vulnerable to danger."
>
> Appendix, at 8a-9a (emphasis added).

This is a complete misunderstanding and misapplication of the *DeShaney* holding. It simply goes far beyond the meaning of *DeShaney* to take this Court's observation in dicta that the state "**did not do anything**" to make the DeShaney child more vulnerable to danger, and turn it around to find a constitutional rule that "**if the state does anything**" to render an individual more vulnerable to

danger" the Fourteenth Amendment's guarantee of substantive Due Process has been violated. This Court's negative observation simply cannot be turned inside-out to find a positive rule. If it could, *DeShaney* would have been decided differently.

What the Sixth Circuit did, in effect, was to create a tort-based "but for" liability out of an opinion, whose central point was to remind the lower courts, once again, that the Fourteenth Amendment is not a "font of tort law." As this Court clearly explained, the state officer's actions in *DeShaney* may have created a liability under state tort law, "[b]ut here the claim is based on the Due Process Clause of the Fourteenth Amendment, which as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S., at 202. This point is made by this Court even more forcefully in its subsequent opinion in *County of Sacramento v. Lewis, supra.*

III.

THE OPINION OF THE SIXTH CIRCUIT CONFLICTS WITH AN OPINION OF THE SEVENTH CIRCUIT IN *ESTATE OF STEVENS v. CITY OF GREEN BAY.*

Even if this Court does intend to permit courts below to find substantive Due Process violations in non-custodial situations whenever a state officer's contact with a person enhances that person's vulnerability to danger, this Court must resolve a conflict between the circuits regarding the degree of danger-enhancement required to support such a constitutional violation. In this case, the Sixth Circuit found that if the state does "**anything** to

render an individual more vulnerable to danger" the Constitution is violated. In *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir. 1997), the Seventh Circuit held that "[t]o recover under this theory, the estate must demonstrate that the state **greatly increased** the danger to Stevens **while constricting access to self-help**; it **must cut off all avenues of aid** without providing a reasonable alternative. Only then may a constitutional injury have occurred." *Id.*, at 1177 (emphasis added).

Estate of Stevens also presented a police officer with a belligerent drunk. In that case, Stevens got so drunk at a bar that he got into a fight with a Green Bay Packer. The bar's bouncers forced the fight outside into the parking lot. When the police arrived, both sides refused to press charges. The bar manager told the officer that Stevens, who was bleeding, was not welcome in the bar and could not reenter, so the officer went inside and told Stevens' friends that he could not return. The officer offered to call for medical assistance or a taxi for Stevens, but he declined. When Stevens began walking back towards the bar's entrance, the officer prevented him from doing so. Finally, in order to get Stevens out of the area, the officer offered Stevens a ride to a party store where there was a telephone. Stevens accepted. *Id.*, at 1172. Ninety minutes after Stevens was dropped off at the party store, he was struck by an automobile and died. His autopsy showed a blood-alcohol level higher than Mr. Davis'. Like the case at bar, the estate focused its claim upon an asserted right to protective services and cited *DeShaney*. *Id.*, at 1174. Reviewing the same language from *DeShaney* that the Sixth Circuit reviewed in the case at bar, the Seventh Circuit held that:

> "[t]o recover under this [state enhanced danger] theory, the estate must demonstrate that the state **greatly increased** the danger to Stevens **while constricting access to self-help**; it must **cut off all avenues of aid without providing a reasonable alternative**, Only then may a constitutional injury have occurred.
>
> *Id.*, at 1177 (emphasis added).

Thus in two jurisdictions which have found in *DeShaney* approval of a state enhanced danger theory for substantive Due Process violations, the Sixth and Seventh Circuits are diametrically at the extremes regarding the extent of danger-enhancement which must be shown to establish a constitutional violation. This is an important issue, which this Court should resolve. As this Court appreciated in its opinion in *Lewis*, police officers need guidance in order appropriately to handle situations which occur relatively frequently – like high speed chases. A police officer's encounter with a drunk and belligerent citizen is one of those all too frequently recurring situations. Thousands of times every day, a police officer in this country confronts a drunk. Unless these officers get guidance from this Court as to the extent of their responsibilities, their safest response is to do nothing, ignore the drunk, and hope that he does not commit any serious crimes. And, if he does, at least the officers are not subject to the second guessing that a subsequent § 1983 action without clear standards defining the right will engender. Indeed, the concern for "over deterrence" that an insufficiently defined right causes is a cornerstone of this Court's formulation of the qualified immunity doctrine. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed.2d 396; 102 S.Ct. 2727 (1982). This Court should

grant a writ of certiorari in order to resolve this important conflict and clarify the contours of the substantive Due Process right involved.

CONCLUSION

For these reasons this Court should grant this petition.

Respectfully submitted,

MICHAEL C. MORAN
STEIN, MORAN, RAIMI & GOETHEL P.C.
320 N. Main Street
Ann Arbor, MI 48104
(734) 769-6838
Counsel of Record

FREDRICK L. SCHMOOL
MICHAEL W. EDMUNDS
GAULT DAVISON, P.C.
Northbank Center
Flint, MI 48502
(810) 234-3633
Co-Counsel

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVERSON DAVIS, *Plaintiff-Appellee,*	)	
v.	)	No. 96-2575
PATRICK BRADY and SHAWN MURPHY, *Defendants-Appellants.*	)	

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 95-71435 – Anna Diggs Taylor, Chief District Judge.

Argued: March 13, 1998

Decided and Filed: May 8, 1998

Before: KEITH, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

COUNSEL

ARGUED: Frederick L. Schmoll, III, GAULT DAVISON LAW OFFICES, Flint, Michigan, for Appellants. George R. Hamo, Flint, Michigan, for Appellee. **ON BRIEF:** Frederick L. Schmoll, III, GAULT DAVISON LAW OFFICES, Flint, Michigan, for Appellants. George R. Harno, Flint, Michigan, for Appellee.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Defendant police officers Patrick Brady and Shawn Murphy appeal the district court's denial of summary judgment on qualified immunity grounds. The plaintiff, Steverson Davis, alleges that the defendants violated his substantive due process rights by placing him at risk of harm when they abandoned him in an inebriated condition on an unfamiliar highway. The district court found that the record presented a claim sufficient to defeat summary judgment, including the establishment of a duty not to subject Davis to danger, and that the defendant officers acted with deliberate indifference to the threat of injury to Davis. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Having consumed a substantial amount of Thunderbird wine and a half-pint of vodka, Davis attempted to enter the Carriage Town Mission in Flint, where he had been living. The mission staff refused him entry due to his inebriated condition. Davis became violent and broke some of the mission's windows. The mission staff called the police.

Officers Murphy and Brady responded to the call. At 6:48 that evening, they arrested Davis for intoxication and disorderly conduct and brought him to the Flint police station. Davis was subsequently transferred to the county jail, but that facility was full. The desk sergeant therefore instructed Officers Murphy and Brady to "release Davis at the county jail if he was not so drunk that he would be a hazard to himself." No permission to transport Davis was requested by the officers nor given

by their sergeant. Disregarding these instructions, the officers handcuffed Davis and placed him back in the squad car.

The officers then drove Davis to Bray Road in Genesee Township, which was located outside the city limits of Flint, and let Davis out of the squad car at the entrance to Bluebell Beach. Bray Road is a 55-mile-per-hour speed limit area, with few street lights and no sidewalk. The officers insist that they released Davis at this location at Davis's request, but Davis denies making such a request, and contends that the officers brought him to Genesee Township to "teach [him] a lesson." In his account of the situation, the officers threw him out of the car, forced him to the ground, called him a "smart ass," and told him to find his own way back into the city.

After the officers left, Davis headed for some nearby houses, where he asked one of the residents to call the police. Genesee Township Police Officer Bruce Carlson responded to the call at 9:03 p.m. According to Officer Carlson, he offered to give Davis a ride or to call someone for him, suggesting an ambulance, a taxi, and a friend or relative. Officer Carlson insists that Davis rejected assistance, calling him "just another damn white officer." In contrast, Davis maintains that he asked Officer Carlson for a ride back to Flint and that Carlson refused. Officer Carlson testified that he did not have sufficient contact during this time to ascertain whether Davis was drunk.

Officer Carlson left at 9:12 p.m., and Davis was hit by a car approximately seven minutes later, sustaining serious permanent injuries. One of his legs was amputated, and he is now a semi-quadriplegic.

Officers Brady and Murphy contend that Davis was sober when they released him on Bray Road. However, the parties have stipulated that Davis's blood alcohol level was still .176 at 10:00 p.m., when he arrived at the hospital after the accident. A toxicologist testified that at the time Davis was released on Bray Road, his blood alcohol would have been between .191 and .206, and that at that level, he would have shown signs of perception impairment, disorientation, confusion, and lack of coordination. In addition, other witnesses who saw Davis on Bray Road testified at trial that he was staggering, slurring his words, seemed drunk, and could hardly stand up.

Davis filed a lawsuit against Officers Brady and Murphy for alleged violations of his civil rights under 42 U.S.C. § 1983. The officers moved for summary judgment, which was granted in part and denied in part. The officers now appeal the district court's denial of summary judgment.

STANDARD OF REVIEW

A denial of summary judgment on qualified immunity grounds is reviewed de novo. *Washington v. Newsom*, 977 F.2d 991, 993 (6th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993). When analyzing a qualified immunity issue, we must first determine whether the plaintiff has shown a violation of a constitutionally protected right. *Megenity v. Stenger*, 27 F.3d 1120, 1124 (6th Cir. 1994). If so, the second step is to determine whether the right is so "clearly established" that a "reasonable official would understand

that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

DISCUSSION

Davis alleges that the officers violated his right to "substantive due process" under the Fourteenth Amendment when they deposited him on a dark, busy highway. Because Davis seeks to hold the officers liable in their individual capacities under 42 U.S.C. § 1983, he must show not only that the officers' actions were unconstitutional, but also that they should have known at that time that they were violating his rights. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "It is not necessary that the very action have been previously held unlawful but, given the preexisting law, the unlawfulness of the conduct must have been apparent." *Barton v. Norrod*, 106 F.3d 1289, 1293 (6th Cir.), *cert. denied*, 118 S. Ct. 341 (1997) (citation omitted).

We must therefore determine whether the individual officers violated law that was clearly established in 1994 when they abandoned Davis on the dark, busy highway. When, as here, a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, the court is presented with two distinct, though interrelated inquiries:

> First, in order to find for the plaintiff, the court must conclude that the plaintiff and the state

> actors had a sufficiently direct relationship such that the defendants owed [him or] her a duty not to subject [him or] her to danger. Second, the court must also conclude that the officers were sufficiently culpable to be liable under a substantive due process theory.

Stemler v. City of Florence, 126 F.3d 856, 866 (6th Cir. 1997), *petition for cert. filed* (U.S. Law Week, Feb. 11, 1998) (No. 97-1376).

A. Taking Davis Into Custody Established a Duty

With respect to the first question, we start from the proposition that although the state does not owe its citizens a constitutional duty to keep them from harm in all circumstances, such a duty will arise when the state has acted to deprive an individual of certain indicia of liberty:

> When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) (citation omitted).

In the present case, Davis's complaint alleges – and the record can reasonably be read to show – that after taking Davis into custody, the defendant officers dropped Davis off on a dark, busy highway and left him there against his will. In so doing, the defendant officers took the affirmative act of restraining Davis's freedom to act on his own behalf, and consequently imposed upon themselves a duty to ensure that they were not placing him in danger.

The defendants rely on *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995), to argue that they did not infringe upon Davis's liberty. In *Foy*, the plaintiff had been drinking in a dormitory with his friends. After receiving a complaint, the police came to the dormitory and told them, "Get in your car and get out of here or somebody is getting arrested." *Id.* at 228. Although the police had told them only to leave the premises, the plaintiff and his friends decided to take a lengthy drive from Berea, Ohio, to Crestline, Ohio. Forty-five minutes into that journey, the driver crashed the car, killing Foy. *Id.* This court held that the defendant police officers had not violated Foy's right to substantive due process, since there was no restraint on his liberty that had caused him to take the trip that resulted in his death. *Id.* at 230. *Foy*, however, is inapposite. The distinguishing factor between *Foy* and this case is that the officers never took the men in *Foy* into custody and, therefore, never assumed a duty to provide for their safety.

The defendant officers argue that they owed no duty of care to Davis because his injuries occurred after they

released him from custody and they did nothing to prevent Davis from caring for himself. The defendant officers cite *DeShaney*, 489 U.S. at 201, for this proposition. In DeShaney, the mother of a child who had been beaten by his father brought a civil rights action against social workers and local officials who had received complaints that the child was being abused by his father but had not removed him from his father's custody. The Supreme Court held that the state had no constitutional duty to protect the child because "the harms [the child] suffered did not occur while he was in the State's custody, but while he was in the custody of his natural father . . . " *Id.* The Supreme Court held that "in the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id.* at 200. Even though the state had previously taken the child into custody, the Supreme Court held that "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *Id.* at 201.

DeShaney, however, is not dispositive here. Language in that opinion suggests that the state may owe a duty to individuals in certain non-custodial settings:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to

> them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

489 U.S. at 201. Significantly, we have previously suggested that this language in *DeShaney* stands for the proposition that "a duty to protect can arise in a noncustodial setting if the state does anything to render an individual more vulnerable to danger." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994). Unlike the situation in DeShaney, moreover, the defendant officers in this case placed Davis in a more dangerous situation than he was prior to their interference, when they drove him outside the Flint city limits and abandoned him on a dark and dangerous highway in an unfamiliar area.

Likewise, the defendant officers' contention that the release of Davis from their custody terminated their duty is unavailing. The holding in *Stemler*, 126 F.3d at 867-868, established that an officer's duty exists even after the custodial relationship has ended. In *Stemler*, this court determined that police officers violated a woman's substantive due process rights when they took her from a car in which she had been riding and placed her in a truck driven by her abusive, intoxicated boyfriend, who wrecked shortly thereafter. The court found that the woman was deprived of her liberty (and ultimately her life) without due process when the police threatened to arrest her if she did not leave with her boyfriend and, subsequently, physically placed her in his truck. Even

though the woman was out of police custody when she was killed, we held that the police had a duty to protect her by focusing on the fact that she was in the officers' custody at the time she was forced into the truck. *Id.* at 869.

Just as the police in *Stemler* had a duty to the plaintiff because they put her in harm's way, the defendant officers here owed Davis a duty. Based on *Stemler*, the fact that Davis's injuries resulted after the defendant officers released him from custody is not controlling. What is key is that the defendant officers put Davis in a situation, while in custody, and allegedly against his will, that caused his injuries.

Finally, the defendant officers assert that in 1994 there was no clearly established right not to be abandoned by the police and rely on *Walton v. City of Southfield*, 995 F.2d 1331, 1337 (6th Cir. 1993), to support this assertion. *Walton*, however, is inapposite. The plaintiffs in *Walton* were child passengers in a car driven by a woman who was arrested. The children were left to find a way home on their own. The court held that the officers were entitled to qualified immunity because *DeShaney* did not recognize a passenger's clearly established right not to be abandoned by the police after the arrest of the driver of the vehicle in which they were riding. *Id.* at 1337. The court also stated, however, that *DeShaney* did not foreclose the possibility that such a right existed if "abandonment in a forlorn place" was connected with the state's restraint of an individual's personal liberty. *Id.*

Unlike the children in *Walton*, Davis was in custody when he was abandoned. Because the defendant officers

had custody of Davis, they owed him a duty of protection that was violated when they abandoned him, in the words of *Walton*, in a "forlorn place."

B. Defendants Violated Their Duty to Davis by Exhibiting Deliberate Indifference

The determination that the officers owed Davis a duty of care does not end the court's inquiry, for it must also assess what duty of care they owed, and whether they breached that duty.

In cases such as this one, where the plaintiff suffered injury as a result of being placed in the state's custody, it has consistently and uncontroversially been the rule that a constitutional claim arises when the injury occurred as a result of the state's deliberate indifference to the risk of such an injury. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Although each of these cases involved an Eighth Amendment claim raised by a prisoner, we have repeatedly held that at least the same standard applies to substantive due process claims raised by other persons in the custody of the state. *See, e.g., Durham v. Nu'Man*, 97 F.3d 862, 869 (6th Cir. 1996) (patient at state mental hospital), *cert. denied*, 117 S. Ct. 1337 (1997); *Lintz v. Skipski*, 25 F.3d 304, 306 (6th Cir. 1994) (children in state foster home); *Heflin v. Stewart County*, 958 F.2d 709, 713-14 (6th Cir. 1990) (pretrial detainee); *Meador v. Cabinet of Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990) (children in state foster home).

In the present case, Davis's complaint, as well as the evidence in the record, when read in the light most favorable to Davis, supports a claim that the defendant officers acted with deliberate indifference to the threat of injury to him. They knew, or reasonably should have known, that Davis was drunk and unable to care for himself. Independent witnesses testified under oath that Davis was staggering after the defendant officers released him, slurring his words, seemed drunk, and could hardly stand up. It was stipulated at trial that Davis's blood alcohol level was .176 percent at 10:00 p.m. when he arrived at the hospital after the accident. Additionally, a toxicologist placed his blood alcohol level at the time of the improper police release at approximately .20 percent. At such a level, expert testimony indicated, Davis would have had perception impairment, disorientation, confusion, and lack of coordination. Nevertheless, the defendant officers chose to act affirmatively to place Davis in harm's way.

CONCLUSION

When a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, he must demonstrate, first, that the defendants owed him a duty not to subject him to danger and, second, that the defendants violated this duty by exhibiting deliberate indifference to the plaintiff's well-being. In this case, the taking of Davis into custody triggered the defendant officers' duty to protect Davis. There is sufficient evidence in the record to demonstrate that the defendant officers violated this duty when they exhibited deliberate indifference to Davis's well-being by

abandoning him, in his inebriated state, on an unfamiliar, dark, and busy highway. Accordingly, we **AFFIRM** the district court's denial of the defendant officers' motion for summary judgment and **REMAND** the case for further proceedings.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

STEVERSON DAVIS,
Plaintiff,
vs
PATRICK BRADY
and SHAWN MURPHY,
Jointly and Severally,
Defendants.
_____/

CIVIL NO: 95-71435
JUDGE:
ANNA DIGGS-TAYLOR
ORDER

GEORGE R. HAMO
(P33033)
Attorney for Plaintiff
142 W. Second St-Ste 101
Flint, MI 48502

FREDERICK SCHMOLL, III
(P20024)
Attorney for Defendant
10th Floor
432 N. Saginaw Street
Flint, MI 48502

THIS MATTER having come before the court on defendants motion to dismiss counts I, II and IV, the court having read the briefs and listened to oral arguments, for the reasons stated on the record on November 18, 1996, defendant's motion is granted as to Count II but denied as to Counts I and IV.

/s/ Anna Diggs-Taylor
ANNA DIGGS-TAYLOR,
U.S. DISTRICT JUDGE

Dated: Nov. 26, 1996

Approved:

/s/ George R. Hamo
GEORGE R. HAMO (P33033)
Attorney for Plaintiff

/s/ Michael Gildner For (With Permission 11/19/96)
FREDERICK SCHMOLL, III (P20024)
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVERSON DAVIS,

Plaintiff,

CIVIL ACTION NO. 95-CV-71435-DT

v.

PATRICK BRADY,
SHAWN MURPHY,

Defendants.

_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE ANNA DIGGS TAYLOR
United States District Judge
738 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Monday, November 18, 1996

APPEARANCES:

GEORGE HAMO, ESQ.,
142 W. Second Street
Ste. 101
Flint, MI 48502
In behalf of Plaintiff.

FREDERICK SCHMOLL, ESQ.,
Gault Davison, ESQ.,
Tenth Floor, Northbank Center
432 North Saginaw Street
Flint, MI 48502
In behalf of Defendants.

* * *

[p. 17] discrimination.

THE COURT: Okay. Any rebuttal?

MR. SCHMOLL: Not unless they're any questions from the court.

MR. HAMO: Likewise, judge, if you have any any questions.

THE COURT: I think I must dismiss the conspiracy claim, that is Count Two as I understand it, because these officers are being sued in their capacity, their official capacity as officers and representatives of the municipality. And two agents of the same corporate entity may not conspire with each other, they are part of the same single unit.

However, I'm going to deny the motion on qualified immunity as applied to Counts One and Four.

None of the cases cited by the movant are applicable to the facts of this case in which the plaintiff, Mr. Davis, was taken into custody.

And all of the standards of *DuChaney* were met. The special relationship was established which required that the officers provide for his safety thereafter.

He was taken into custody and they were instructed specifically to release him if he's not a danger to himself; and he clearly was, because after release, the evidence is undisputed that he was drunk.

[p. 18] The eye witness said he was drunk and the objective testing has told us that he was drunk and,

therefore, incompetent. He was not even competent as the facts bore out to seek help appropriately.

He rejected help that might have saved him because of his incompetence. And the custody these officers put him in was the cause of the entire resulting injuries, because once they established the special relationship, they put him in very serious danger and abandoned him there.

They simply didn't release him at the door of the headquarters or back in the city or failed to take him up when they saw him drunk in the street.

They took him and placed him in a much more serious condition in the dark, on the country road with a high-speed limit and abandoned him there. That was an abuse of the special relationship they had established.

And they were – if that requirement is required, deliberately indifferent to his needs in placing him in this extreme jeopardy, when they knew he was not competent to fend for himself in this new position that they selected for him.

So their responsibility is clearly established by the law and they may not enjoy a qualified immunity for their activities. And those counts can't be dismissed.

[p. 19] So please prepare an order.

MR. HAMO: I will be happy to do that, judge.

(This hearing concluded at 2:45 p.m.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVERSON DAVIS,

Plaintiff,

v.

CIVIL ACTION
NO. 95-CV-71435-DT

PATRICK BRADY and
SHAWN MURPHY,
jointly and severally

Defendants.

_____/

DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE ANNA DIGGS TAYLOR
United States District Judge
738 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Monday, January 8, 1996
(Filed May 9, 1997)

APPEARANCES:

GEORGE R. HAMO, ESQ.,
142 W. Second Street, Ste. 101
Flint, MI 48502
In behalf of Plaintiff.

FREDERICK SCHMOLL, III ESQ.,
10th Floor Northbank Center
432 North Saginaw Street
Flint, MI 48502
In behalf of Defendants.

* * *

[p. 22] made, but there isn't one being made. It's got absolutely nothing to do with these officers, whether they were disciplined or not disciplined by the City of Flint.

And, lastly, the Sixth Circuit *Walton* case, I mean if we're talking about leaving someone in a position of danger, in the *Walton* case, we had two minors were left unattended because their parent was taken into custody.

THE COURT: Were they arrested?

MR. SCHMOLL: The parent was, the two minors weren't.

THE COURT: They weren't.

MR. SCHMOLL: And in *DeShaney*, we had young Joshua who had been in custody of the state and was returned to an abusive parent.

So if the argument is simply that there's some heightened standard if an individual had been at some time in custody, the Supreme Court in the United States *DeShaney* case says, no. It says it's not true because, yes, you did have young Joshua under state protection and you returned it to that parent. We have the same kind of analysis here, so we ask our motion be granted.

THE COURT: All right. Well, for the reasons briefed and argued by the plaintiff, the court must deny the request that qualified immunity be provided the defendants under the circumstances of this case.

[p. 23] It is, first of all, a case far different from any cited by the defense in their suggestion that qualified

immunity should be afforded them on the facts that the plaintiff describes and the court must assume will be presented at trial.

This man was under arrest and was, according to the testimony of witnesses, so drunk that he could not stand up when he was unhandcuffed and released from police custody on a dark country road, many miles from the urban sight of his arrest, on a two lane highway with a fairly high-speed limit.

There was no exigency that would justify the determination of the officers to abandon a person with obvious need under those circumstances.

The officers have taken the time to go pretty far, taken substantial amount of time to place him in the jeopardy they placed him. His circumstance was obvious.

If the facts are borne out at trial and those facts certainly constitute deliberate indifference and any reasonable officers under the circumstances should have been well aware that he was prohibited under his own doing from placing citizens dependent upon the paternal status of the state in such danger.

So the qualified immunity is denied and the motion for summary judgment is denied as well. Facts [p. 24] presented, at least according to the plaintiff's version, certainly would suggest that a case of deliberate indifference a prisoner's medical, physical human needs and egregious case of deliberate indifference or deliberate indifference had been made out in this case.

So the motion's denied.

MR. HAMO: Thank you very much. Your Honor. Would the court like me to draft an order?

THE COURT: Please, yes.

MR. HAMO: I will do so.

THE COURT: And, of course, inasmuch as discovery's not complete, the conspiracy claim will be denied without prejudice. The others are denied simply.

MR. HAMO: Thank you, judge.

(This hearing concluded at 11:47 a.m.)

96-2575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVERSON DAVIS,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
PATRICK BRADY AND SHAWN MURPHY,	)	(Filed Jun 29, 1998)
Defendants-Appellants.	)	

BEFORE: KEITH, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

STEVERSON DAVIS,

Plaintiff,

vs

PATRICK BRADY and SHAWN MURPHY, Jointly and Severally,

Defendants.

CIVIL NO: 95-71435

JUDGE: ANNA DIGGS TAYLOR

PLAINTIFF'S FIRST AMENDED COMPLAINT

GEORGE R. HAMO (P33033)
Attorney for Plaintiff
142 W. Second St. – Ste 101
Flint, MI 48502

FREDERICK SCHMOLL, III (P20024)
Attorney for Defendants
10th Floor, Northbank Center
Flint, MI 48502

Plaintiff, through counsel, in support of his complaint states as follows:

1. This is an action for damages sustained by a citizens of the United States against police officers in the Flint Police Department.

JURISDICTION AND VENUE

2. This action is brought pursuant to 42 USC 1983, 1985, 1988 and the Fifth, and Fourteenth Amendments of the Constitution, and pendent state claims.

3. Jurisdiction is predicted [sic] upon 28 USC1331 (federal question), and 1343 (civil rights).

4. Venue is appropriate in this Court pursuant to 28 USC 1391 as all defendants reside and the claim arose in this district.

5. The amount in controversy exceeds the jurisdictional limit of this Court and further plaintiff requests a jury trial.

THE PARTIES

6. Plaintiff Steverson Davis is a resident of the City of Flint, Genesee County and a citizen of the United States.

7. At all relevant times, defendants Brady and Murphy were police officers employed by the City of Flint Police Department, and at all relevant times as set forth in this complaint acted in their capacities as employees of the City of Flint.

8. At all relevant times and in all their actions as set forth in this complaint, defendants acted under color of the state law and pursuant to their authority as police personnel employed by the City of Flint.

FACTUAL ALLEGATIONS

9. On November 17, 1994, Steverson Davis was arrested by defendants for breaking three windows at the Carriage Town Mission. Steverson Davis was intoxicated at the time of his arrest for disorderly person.

10. Defendants transported Davis to the City of Flint Police Department, where he was fingerprinted and booked, then transported him to the Genesee County Jail. They were not permitted to lodge him at the County Jail because of overcrowding. He was released pending further investigation (PFI).

11. Then, handcuffed in the back of the cruiser, defendants took him in their police vehicle to Bray Road in Genesee Township, opened the back door of the cruiser, pulled him out of the back seat, threw him on the ground, still handcuffed, then placed a foot against his face thereby holding his face against the ground, removed the handcuffs and stated for him to find his own way back to Flint even though defendants knew that Steverson Davis was intoxicated and that the Bray Road area was unfamiliar to him and unlighted.

12. Defendants then proceeded to depart in their police vehicle, leaving Steverson Davis in an intoxicated state in the unfamiliar, unlit area.

13. Steverson Davis knocked on two private residences to use a phone and, not being able to, began to walk in his intoxicated state.

14. A Genesee Township police officer was summoned to the area because of a 911 call from one of the above residents, and after talking with Steverson Davis

for a very short time, concluded that Steverson Davis had broken no laws and was not subject to arrest by this officer, and thereby left the scene.

15. Within a few minutes, still walking and still intoxicated, Steverson Davis was hit by a vehicle, suffering severe and permanent damages.

16. As a result of the actions of defendants, Steverson Davis suffered, and continues to suffer, extreme pain, humiliation, emotional and psychological distress, fear, amputation, paralyzation and permanent lifetime physical and emotional damages.

COUNT I
VIOLATION OF 42 USC 1983

17. Plaintiff incorporates all paragraphs in this complaint into this count except for Counts V and VI.

18. By reason of their acts as set forth in this complaint, defendants acted under color of State law and with malice to subject Steverson Davis to the deprivation of his rights, privileges and immunities secured by the Constitution and laws, including, but not limited to:

A. Steverson Davis' right not to be deprived of life, liberty or property without due process of law, as secured by the Fifth and Fourteenth Amendments of the Constitution;

B. Steverson Davis' right to be guaranteed equal protection of the laws, as provided by the Fourteenth Amendment to the Constitution;

COUNT II
VIOLATION OF 42 USC 1985

19. Plaintiff incorporates all paragraphs in this complaint into this count except for Counts V and VI.

20. The defendant officers conspired and committed malicious acts in furtherance of their conspiracy to deprive Steverson Davis of his right to equal protection under the law, injured him and deprived him of rights and privileges of citizens of the United States, in part selecting him because he is black.

21. Defendants conspired and committed acts in furtherance of a conspiracy to cover-up the police misconduct, depriving Steverson Davis of his rights under the Constitution, including his right to bring a civil action for redress of their malicious and hateful acts.

22. The defendants acted in furtherance of their conspiracy by engaging in one or more of the following acts:

A. Improperly transporting and leaving the seriously intoxicated Steverson Davis in an area that was unknown to him, unlit and perilous;

B. Physically throwing Steverson Davis, while he was seriously intoxicated, onto the ground, holding his face down against the ground with a police issued boot, then leaving him in a risky and precarious situation stating to him to find his own way back to Flint;

C. Failing to adhere to the proper police standards of care as set forth in the customs and policies of police procedure not only within the City of Flint but also nationwide including treatment of persons in custody;

D. Failing to report the accurate and correct version of this incident;

E. Denying the accurate and correct version of this incident;

F. Assisting in the cover-up of this serious police misconduct.

23. By reason of the conduct as set forth in this count, Steverson Davis suffered damages as set forth in paragraph 16 which are included here by reference.

WHEREFORE, Steverson Davis respectfully requests judgment against the defendants for their violations of 42 USC 1983 and 1985(3) in an amount in excess of the jurisdictional amount of this Court, along with exemplary damages, as well as attorney's fees under 42 USC 1988, and costs and interest thereon.

COUNT III
ASSAULT AND BATTERY

24. Plaintiff incorporates all paragraphs in this complaint into this count except paragraphs 17 and 18.

25. At all relevant times as set forth in this complaint, the defendants acted within the course and scope of their employment with the City of Flint Police Department, and within the apparent scope of their agency as agents of the City of Flint Police Department.

26. The physical manhandling of Steverson Davis as described previously in this complaint constitute an assault and battery which was committed without provocation, privilege or justification, and Steverson suffered

injuries, fear, humiliation and mental anguish as a result of that battery.

27. Steverson Davis was repeatedly made to suffer apprehension of further physical injuries and intimidation by defendants.

COUNT IV
SPECIAL RELATIONSHIPS

28. Plaintiff incorporates all paragraphs in this complaint into this count.

29. At all relevant times as set forth in this complaint, defendants acted within the course and scope of their employment with the City of Flint Police Department and within the apparent scope of their agency as agents of the City of Flint Police Department.

30. Once defendants had custody and control of Steverson Davis, they owed him the duty of reasonable care and protection because of the special relationship between the officers and Steverson Davis as their detainee.

31. Defendants breached their duty of reasonable care and protection by:

A. Assaulting Steverson Davis;

B. Battering Steverson Davis;

C. Placing Steverson Davis in a position of danger that he would not otherwise have been in but for the actions of the defendants.

32. Defendants acted with deliberate indiffence [sic] to the rights, care and protection of Steverson Davis

while he was in the custody, care and control of defendants.

33. As a direct and proximate result of the actions of defendants, Steverson Davis suffered damages as outlined in paragraph 16 of this complaint.

COUNT V
GROSS NEGLIGENCE

34. Plaintiff incorporates all paragraphs in this complaint into this count except paragraphs 17 and 18.

35. While exercising control, custody and care over Steverson Davis, defendants had a duty to act without gross negligence.

36. By reason of their acts as set forth previously in this complaint and incorporated into this count, defendant's conduct was so reckless that it demonstrated a substantial lack of concern for whether an injury resulted to Steverson Davis.

37. As a direct and proximate result of the defendant's breach of this duty, Steverson Davis was severely injured as set forth in paragraph 16 of this complaint in an incorporated area.

COUNT VI
WANTON AND WILFUL MISCONDUCT

38. Plaintiff incorporates all paragraphs in this complaint into this count except paragraphs 17 and 18.

39. Defendants acted with deliberate indiffence [sic] to the rights, care and protection of Steverson Davis

while he was in the custody, care and control of defendants.

40. While exercising care, custody and control over Steverson Davis who was a detainee of defendants, defendants had an obligation to not act in a wanton and willful manner.

41. Contrary to the above duty, defendants actions as set forth in this complaint showed an intent to harm Steverson Davis or an indifference as to whether harm would result to Steverson Davis.

42. Further, defendants knew that the situation involving Steverson Davis required the exercise of ordinary care and diligence to avert injury to Steverson Davis and defendants had the ability to avoid injury to Steverson Davis by exercising such care and diligence, but instead chose the course of conduct that displayed an intent to harm Steverson Davis or at least an indifference to harm Steverson Davis equivalent to a willingness that harm to Steverson Davis occur.

43. As a direct and proximate result of the above, Steverson Davis was severally injured as set forth in paragraph 16 above.

GENERAL ALLEGATION

44. As applied to all counts in this complaint, defendant's actions constituted a deliberate indifferrence [sic] and reckless disregard to Steverson Davis' rights, both Federal and State, as well as his care and protection, and defendants actions displayed a failure to act when the need to do so was obvious.

WHEREFORE, Plaintiff Steverson Davis respectfully requests judgment against the defendants, jointly and severally in an amount to which he is entitled, said amount to exceed the jurisdictional amount of this Court, with exemplary damages, attorneys fees pursuant to Federal and State laws, costs and interest, and any other further relief as the Court deems appropriate.

GEORGE R. HAMO & ASSOCIATES

/s/ George R. Hamo
George R. Hamo (P33033)
Attorney for Plaintiff
142 W. Second St. - Ste 101
Flint, MI 48502
Phone (810) 234-3666

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVERSON DAVIS,

Plaintiff - Defendant

vs

PATRICK BRADY and
SHAWN MURPHY

Defendants - Appellants

Court of Appeals
No: 96-2575

(Filed May 22, 1998)

GEORGE R. HAMO (P33033)
Attorney for Plaintiff-Defendant
142 W. Second St-Ste 101
Flint, MI 48502
(810) 234-3666

FREDERICK L. SCHMOLL, III (P20024)
MICHAEL W. EDMUNDS (P55748)
Attorneys for Defendants-Appellants
Gault Davison, P.C.
Tenth Floor, Northbank Center
432 N. Saginaw Street
Flint, MI 48502
(810) 234-3633

APPELLANTS' PETITION FOR REHEARING; SUGGESTION FOR REHEARING EN BANC

REQUIRED STATEMENTS FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Supreme Court and Court of Appeals for the Sixth Circuit, and that

consideration by the full Court is necessary to secure and maintain uniformity of decisions:

DeShaney v. Winnebago County Dept. of Soc. Servs., 485 U.S. 189 (1989).

Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Malley v. Briggs, 475 U.S. 335 (1986)

Martinez v. California, 444 U.S. 277 (1980).

Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

Foy v. City of Berea, 58 F.3d 227 (6th Cir. 1995).

Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993).

Hanan v. Trammell, 785 F.2d 557 (6th Cir. 1986).

Gazette v. Pontiac, 41 F.3d 1061 (6th Cir. 1994).

Long v. Norris, 929 F.2d 1111 (6th Cir. 1991).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1 Whether police officers have a duty to protect an individual from harm when they have not rendered the individual unable to care for himself?

2 Whether police officers have a duty to protect an intoxicated individual against injury once the individual is no longer in custody?

3 Whether intoxicated individuals had a clearly established Constitutional right, in

November 1994, not to be transported outside city limits after being arrested for public intoxication and disorderly conduct, when the local jails are too overcrowded to take them?

4 Whether it is possible for police officers to release intoxicated individuals without incurring a duty to protect the individual from subsequent harm?

5 Whether police officers can be held liable under § 1983 for events which are not causally related to their decision to release an intoxicated individual from custody?

INTRODUCTION

Petitioners seek a rehearing, and a rehearing en banc, of the panel's decision in *Davis v. Brady*, (No. 96-1575) (decided May 8, 1998) because the panel's opinion conflicts with existing United States Supreme Court and Sixth Circuit precedent, and because the panel wrongly decided several questions which are of exceptional importance.

The panel's decision grants greater Constitutional rights to intoxicated adults than the United States Supreme Court recognizes for children, imposes liability upon police officers who are faced with overcrowded jails which they are powerless to change, elevates a state tort to the status of a Constitutional violation, discourages police officers from arresting drunks, opens the floodgates to thousands of new lawsuits, and adopts the state created danger theory of recovery as the law of the Sixth

Circuit, without finding that the newly created right entitled the defendants to qualified immunity.

ARGUMENT

Whether police officers have a duty to protect an individual from harm when they have not rendered the individual unable to care for himself?

The panel held that the defendants had a duty to protect Davis because he had been in their custody and he was unable to care for himself. However, it is undisputed that Davis' inability to care for himself was due to his voluntary intoxication, not any actions by the officers. Accordingly, the panel's decision conflicts with *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 485 U.S. 189 (1989), which held that a duty to protect an individual against injury from other persons is only triggered when state actors restrain an individual's liberty and render the individual unable to care for himself, "through incarceration, Institutionalization, or other similar restraint of personal liberty." 485 U.S. at 200.

The effect of the panel's decision is to provide Davis, an adult who made a conscious choice to intoxicate himself, with more Constitutional rights than four year old Joshua DeShaney.

Whether police officers have a duty to protect an intoxicated individual against injury once the individual is no longer in custody?

The panel cited *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), for the proposition that the duty to protect an individual against injury from other persons

continues after custody has been terminated. This contradicts *DeShaney* and *Stemler*. *DeShaney* found that the state had no duty to protect Joshua DeShaney from the injury that befell him because the harms [he] suffered did not occur while he was in the State's custody," even though they were foreseeable. *DeShaney*, 489 U.S. at 201. *Stemler* only held that the officers' duty to protect Black continued for as long as she was restrained and unable to care for herself, not that it continued after custody terminated. *Stemler*, 126 F.3d at 868.

Like *DeShaney*, *Stemler* focused on the restraint, and whether it rendered Black unable to care for herself, not simply "custody." The court stated that the officers "physically lifted [Black] out of Stemler's car and placed her in the truck against her will. In so doing, the officers took the 'affirmative act of restraining [Black's] freedom to act on her [own] behalf,' and consequently imposed upon themselves a duty to ensure that they were not placing her in danger." *Stemler*, 126 F.3d at 868.

The dispositive fact in *Stemler* was the act of placing Black into a vehicle driven by an abusive, intoxicated person, not whether Black was intoxicated. The danger to Black would have been the same whether she was intoxicated or not, because her inability to care for herself did not stem from her intoxication, but from the fact that she was confined to the dangerous vehicle until it stopped. The court stated that "Black was rendered unable to protect herself by virtue of both the threat of arrest and her physical placement in the truck by the officers." *Stemler*, 126 F.3d at 868. She "never had the opportunity to make a voluntary choice to continue driving with Kritis beyond the span of time that the police had in

effect ordered her to do so; her fatal accident occurred about five minutes after the truck left the police stop." *Id.*

The act of placing the decedent in the vehicle with a drunk driver was a restraint of personal liberty which was "similar" to incarceration and institutionalization, and it was this affirmative act of restraint which rendered her unable to care for herself. Thus, although custody ended once the decedent was in the vehicle, she was still restrained and unable to care for herself until the vehicle came to a stop. Davis, however, was not rendered unable to care for himself by being arrested and released. The panel should not have found a duty. To do so creates a new rule of law which is at odds with *Stemler.*

Whether intoxicated individuals had a clearly established Constitutional right, in November 1994, not to be transported outside city limits after being arrested for public intoxication and disorderly conduct, when the local jails are too overcrowded to take them?

The panel appears to have denied defendants' claim of qualified immunity, but never articulates the clearly established Constitutional right which is alleged to have been violated, and never explains why the officers should have been aware of the existence of this right in November 1994. This contradicts *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Anderson v. Creighton,* 483 U.S. 635 (1987); *Malley v. Briggs,* 475 U.S. 335 (1986); *Long v. Norris,* 929 F.2d 1111 (6th Cir. 1991); *Foy v. City of Berea,* 58 F.3d 227 (6th Cir. 1995), and *Walton v. City of Southfield,* 995 F.2d 1331 (6th Cir. 1993).

Government officials performing discretionary functions are shielded from liability for civil damages unless

their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818-19. For a constitutional right to be clearly established, "the law must be clear in regard to the official's particular actions in the particular situation." *Long*, 929 F.2d at 1114. "[I]n the light of preexisting law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Foy*, 58 F.3d at 233 (quoting *Malley*, 475 U.S. at 341).

The panel refused to follow these Supreme Court decisions by failing to identify the particular right which has been violated. This is because the panel has articulated a new right which did not exist at the time the defendants took Davis outside of town. The panel adopts the "state created danger theory" for the first time in this circuit, and applies it retroactively to the defendants in violation of the rule of law established by *Harlow*, *Anderson*, *Malley* and *Long*. This is evident from the fact that the panel does not point to any specific decisions which demonstrate that there was a clearly established Constitutional right in November 1994, which would have put the officers on notice. Whether *Foy* or *Walton* support defendants' contention that there was no clearly established Constitutional right, they surely do not establish such a right.

The Sixth Circuit has never explicitly adopted the state created danger theory of liability in § 1983 cases. This circuit has always applied a pure *DeShaney*-custody analysis. Yet this panel applies the state created danger theory as if it were established law in this circuit, finding

that "the defendant officers in this case placed Davis in a more dangerous situation." In support of its application of the theory, the panel cites to *Gazette v. City of Pontiac*, 41 F.3d 1061 (6th Cir. 1994). However, *Stemler* clearly stated that the language in *Gazette* was "dicta." *Stemler*, 126 F.3d at 868. *Stemler* found it unnecessary to address the viability of the state created danger theory, refusing to "opine as to the circumstances under which a substantive due process claim in a non-custodial setting is possible." *Id.*

It is unclear, then, whether this panel has now adopted the state created danger theory, by way of a cite to *Gazette*, but the panel should be given an opportunity to clarify whether that was its intention. Furthermore, if this new theory is to be adopted, in such a controversial, hotly contested area of Constitutional law, the full court should be given an opportunity to decide whether it agrees with the new direction the panel is taking the court.

Whether it is possible for police officers to release intoxicated individuals without incurring a duty to protect the individual from subsequent harm?

This is a question of exceptional importance because the answer will have such a widespread impact on so many people. If the decision stands as it now reads, it will deter police officers from arresting drunks, it imposes a heavy burden upon police officers for circumstances beyond their control, it elevates a simple tort to Constitutional status, it cuts against the general policy of barring individuals from recovering in tort for injuries they received as a result of being intoxicated, and it

opens the floodgates to thousands of new lawsuits by intoxicated individuals who are injured after being released from police custody.

Police officers will choose not to arrest intoxicated individuals, rather than risk incurring § 1983 liability, because there is no way for officers to know when their duty ends once they take a drunk into custody. Despite the many criticisms leveled on the *DeShaney* opinion, the custody-restraint standard provides a meaningful, bright line rule to guide police officers. Under the panel's decision, officers face liability for subsequent injuries whether they release an intoxicated person at home, on the street, or at a detox center. Some drunks, like Davis, are homeless, but the officers do not have the resources to track down addresses. Some drunks, like Davis, will give false information, which the officers cannot afford to rely upon. Some drunks, like Davis, face a more dangerous situation at home than they do on the street. Yet officers would also face § 1983 liability if they attempted to retain custody of a drunk, like Davis, who wanted to be released, in order to protect the drunk against the dangers of the world.

This will have a negative impact on the health and safety of drunks, as well as the public at large. One of the reasons for public intoxication and disorderly conduct statutes is to protect violent drunks from themselves and from the people they anger. For example, Davis was in danger at the mission, because he had been shouting obscenities and breaking windows. In addition, the public has an interest in having the police protect them from drunks by arresting them and removing them.

In addition to the chilling effect the panel will produce upon police practice, the panel imposes a heavy and unfair burden upon police officers, who have no control over the availability of facilities to house drunks. The jails of the notion are overcrowded, and police officers should not bear the brunt of this problem. Furthermore, many communities lack a detox center, through no fault of the police force.

The panel elevates a simple tort, the alleged negligence of the police officers, into a Constitutional violation. This is poor judgment, as a matter public policy, but it also runs afoul of the clearly established maxim that the courts are hesitant to expand notions of substantive due process. *See* DeShaney, *generally*.

The law generally seeks to deter people from excessive drinking and public intoxication by denying them the right to recover for injuries sustained while drunk. For example, most states prohibit drunks from maintaining a tort action against furnisher of alcohol, whether it be dram shop, or social host. In addition, many states prohibit suits against the police for injuries sustained during a high speed chase if the victim was intoxicated. It is a long standing principle of the common law that intoxication is not a defense to a crime, for public policy reasons. This policy will be thwarted by the panel's holding.

Finally, the panel compels federal district court judges to incur the substantial burden of thousands of new lawsuits which this decision will attract.

Whether police officers can be held liable under § 1983 for events which are not causally

related to their decision to release an intoxicated individual from custody?

The United States Supreme Court and the Sixth Circuit have consistently refused to impose § 1983 liability, without even reaching the issue of whether state actors owed a duty or whether the duty was violated, when the causal connection between the state actions and the harm is tenuous. *Martinez v. California,* 444 U.S. 277, 285 (1980); *DeShaney* at n 4; *Janan v. Trammell,* 785 F.2d 557 (6th Cir. 1986); *Gazette v. Pontiac,* 41 f.3d 1061 (6th Cir. 1994). This panel conflicted with these precedents when it held defendants liable for an injury which befell Davis after he had reached a position of safety. The panel did not even discuss the causation issue, although defendants raised it in their brief on appeal. The panel requires that officers remain liable for harm to intoxicated persons who were once in their custody, without regard to what the individuals do once they leave custody. However, *Martinez* stated that the State had no duty to prevent the death of Martinez because it was "too remote a consequence of the parole officer's action to hold them responsible under federal civil rights law." *Martinez,* 444 U.S. 277 (1980).

In this case, it is undisputed that Davis safely navigated his way from the point where he was released to the Piccobotta home nearby, and had the opportunity to make a phone call for request help. He also stopped and spoke to officer Carlson, of the Genesee Township police department, after leaving the Piccobotta residence. By continuing to hold the officers liable for their decision to take Davis to Bray road, despite the fact that Davis put himself back into danger, the panel violates United States Supreme Court precedents.

CONCLUSION

Appellants therefore request that the panel grant their petition for a rehearing, on the basis of the above discussed errors and omissions, or in the alternative, that the court grant a rehearing en banc.

GAULT DAVISON, P.C.
Attorneys for Defendants-Appellants

/s/ Frederick L. Schmoll
FREDERICK L. SCHMOLL, III (P20024)

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